UMW Toyota (M) Sdn Bhd v Chow Weng Thiem

HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO 12-15-1995
ABDUL MALIK ISHAK J
20 JANUARY 1996

Contract *— Estoppel — Failure to rescind contract within reasonable time — Respondent had enjoyed benefit under contract — Whether respondent estopped from denying validity of contract — Application of principles of approbation and reprobation*

Labour Law *— Domestic inquiry — Admission made at domestic inquiry — Whether court under obligation to make further inquiry*

Words and Phrases *— 'Bonus payments'*

The respondent was at the material time the branch manager of the appellant's establishment in Johor Bahru. In that capacity, on 9 November 1988 the respondent had sold a Toyota Corolla motorcar to HH Lee Motor Credit ('Lee Motor') at Batu Pahat for RM42,941.48. This sale was concluded with the acceptance of a cheque dated 9 November 1988 which was meant to be full payment for the motorcar. Unfortunately, the cheque was dishonoured and Lee Motor was no where to be found. Consequently, the respondent was charged for gross misconduct and the charges levied against him were, namely (i) non-compliance with the appellant company's policies in relation to the administration of the Johor Bahru branch office; and (ii) causing financial loss amounting to RM42,941.48 to the appellant company by allowing credit facilites to Lee Motor. A domestic inquiry was held to look into the charges. At the conclusion of the domestic inquiry, the respondent tendered a letter dated 23 November 1988 wherein he admitted to the charges levied against him. He also appealed to the management to consider his long service of 23 years with the appellant company and implored that he be given 'a chance to continue working with the company'. However in view of the respondent's written admission and in the light of the gravity of the misconduct committed by him, the appellant terminated the respondent's services vide a letter of termination dated 26 November 1988 giving him one month's notice of the termination. The respondent therefore commenced civil proceedings in the sessions court for the following prayers, namely (i) for the loss of earnings for three months totalling RM12,480; (ii) for loss of bonus for two and the half months for 1988 totalling RM10,400; and (iii) for loss of earnings from December 1988 until February 1990 and from March 1990 until August 190 totalling RM75,360. The sessions court judge granted prayers (i) and (ii). The appellant appealed against this decision. The respondent argued that he was only bound by the first contract of employment dated 31 January 1977 which stipulated the period for termination as three months as opposed to the second contract of employment dated 1 January 1984 which stipulated the

notice for termination to be one month. The respondent further argued that the latter contract was a unilateral contract which was unenforceable in law and that it was never meant to represent the terms and conditions of the contract of employment between the parties.

Held, allowing the appeal:

(1) The respondent had enjoyed the benefits under the second contract until his dismissal on 26 November 1988. Consequently he should be estopped from denying that the second contract was not applicable. Having enjoyed the fruits of the second contract for that period of time, he had lost the right to repudiate the same. The prolonged delay on the part of the respondent amounted to an implied affirmation by the respondent of the second contract (see p 685B–C).

(2) The principle of approbation and reprobation should be vigorously applied since the respondent had accepted the increase in salary under the second contract but rejected the one-month period for notice of termination. The second contract should thus be accepted as the contract of employment between the parties (see p 686D–H); *Bartlam v Evans* [1936] 1 KB 202 and *Lee Kim Seng v Acme Canning Sdn Bhd* [1977] 2 MLJ 141 followed.

(3) In light of the respondent's admission at a domestic inquiry, the court was under no further obligation to make any further inquiry and a decision or an order could be made based on the admission. In any event, the evidence supported the case against the respondent. The gross misconduct on the respondent's part must therefore be borne by himself and prayer (i) should not have been granted (see p 688D–G); *Barton v Fincham* [1921] 2 KB 291, *Thorne v Smith* [1947] 1 KB 307 and *Middleton v Baldock* [1950] 1 KB 657 followed.

(4) A bonus is a gift or gratuity as a gesture of goodwill, and not enforceable, or it may be something which an employee is entitled to on the happening of a condition precedent and is enforceable when the condition is fulfilled. But in both cases it is something in addition to or in excess of that which is ordinarily received. Since bonus was a form of gratuitous payment of a discretionary nature, the respondent was not entitled to it as of right. In this case the respondent was not entitled to the two and a half months' bonus claimed in prayer (ii) (see pp 690D–691E); *Malayan Agricultural Producers Association v All Malayan Estates Staff Union* [1982] ILR 127 and *Director-General of Inland Revenue v Highlands Malaya Plantations Ltd* [1988] 2 MLJ 99 followed.

[Bahasa Malaysia summary

Pada masa yang penting penentang telah bekerja sebagai pengurus cawangan syarikat perayu di Johor Bahru. Dalam kedudukannya

seperti itu, pada 9 November 1988 penentang telah menjual sebuah kereta Toyota Corolla kepada HH Lee Motor Credit ('Lee Motor') untuk RM42,941.48. Jualan tersebut telah disempurnakan dengan penerimaan sekeping cek bertarikh 9 November 1988 yang dimaksudkan untuk menjadi bayaran penuh bagi kereta tersebut. Walau bagaimanapun, cek tersebut telah ditolak dan Lee Motor tidak dapat dicari. Oleh itu, penentang telah didakwa dengan tuduhan melakukan kesalahan yang melampau dan tuduhan terhadapnya adalah seperti berikut, iaitu (i) bahawa dia tidak mematuhi polisi syarikat perayu berkenaan dengan pengurusan pejabat cawangan Johor Bahru; dan (ii) bahawa dia telah menyebabkan kerugian kewangan sebanyak RM42,941.48 kepada syarikat perayu kerana telah memberikan kemudahan kredit kepada Lee Motor. Suatu siasatan domestik telah dijalankan untuk menyiasat tuduhan-tuduhan tersebut. Di akhir siasatan domestik tersebut, penentang telah mengemukakan sepucuk surat bertarikh 23 November 1988 di mana dia telah mengaku kepada tuduhan-tuduhan terhadapnya. Penentang juga telah merayu kepada pengurusan untuk mempertimbangkan perkhidmatannya untuk tempoh masa 23 tahun dengan syarikat perayu dan telah meminta supaya dia diberi 'peluang untuk terus berkhidmat dengan syarikat tersebut'.Walau bagaimanapun, memandangkan pengakuan bertulis penentang dan keseriusan tindakan penyelewengan yang dilakukannya, perayu telah menamatkan perkhidmatan penentang menerusi surat penamatan bertarikh 26 November 1988 yang memberikannya notis penamatan selama satu bulan. Penentang telah memulakan prosiding sivil di mahkamah sesyen untuk permohonan-permohonan berikut, iaitu (i) untuk kehilangan pendapatan untuk tiga bulan berjumlah RM12,480; (ii) untuk kehilangan bonus selama dua setengah bulan untuk tahun 1988 berjumlah RM10,400; dan (iii) untuk kehilangan pendapatan dari bulan Disember sehingga Februari 1990 dan dari Mac 1990 sehingga Ogos 1990 berjumlah RM75,360. Hakim mahkamah sesyen telah membenarkan permohonan (i) dan (ii). Perayu telah merayu terhadap keputusan ini. Penentang telah berhujah bahawa dia cuma terikat dengan kontrak pekerjaan yang pertama bertarikh 31 Januari 1977 yang menyatakan bahawa tempoh masa untuk penamatan adalah tiga bulan berbanding dengan kontrak pekerjaan yang kedua bertarikh 1 Januari 1984 yang menyatakan bahawa notis penamatan adalah satu bulan. Penentang selanjutnya telah menghujahkan bahawa kontrak yang kedua itu adalah kontrak satu pihak yang tidak dapat dikuatkuasakan dari segi undang-undang dan bahawa ianya tidak bermaksud untuk mewakili terma-terma dan syarat-syarat kontrak pekerjaan di antara pihak-pihak.

Diputuskan, membenarkan rayuan tersebut:

(1) Penentang telah menikmati faedah-faedah di bawah kontrak kedua sehingga pemberhentiannya pada 26 November 1988. Maka dia

patut diestop daripada menafikan bahawa kontrak kedua itu adalah terpakai. Setelah menikmati faedah-faedah di bawah kontrak yang kedua untuk tempoh masa itu, penentang telah hilang hak untuk menolak kontrak tersebut. Kelewatan yang berpanjangan itu berjumlah kepada pengesahan tersirat kontrak kedua itu oleh pihak penentang (lihat ms 685B–C).

(2) Prinsip persetujuan (approbation) dan penolakan (reprobation) harus digunakan dengan tegas oleh kerana penentang telah menerima kenaikan dalam pendapatannya di bawah kontrak kedua tetapi telah menolak tempoh masa satu bulan untuk notis penamatan. Kontrak kedua itu patut diterima sebagai kontrak pekerjaan di antara pihak-pihak itu (lihat ms 686D–H); *Bartlam v Evans* [1936] 1 KB 202 dan *Lee Kim Seng v Acme Canning Sdn Bhd* [1977] 2 MLJ 141 diikut.

(3) Memandangkan pengakuan tersebut di siasatan domestik, mahkamah tidak mempunyai obligasi untuk membuat siasatan selanjutnya dan suatu keputusan ataupun perintah boleh dibuat berdasarkan pengakuan tesebut. Apa sekalipun, keterangan menyokong kes terhadap penentang. Kesalahan melampau pada pihak penentang mesti ditanggung oleh dirinya sendiri dan permohonan (i) tidak patut dibenarkan (lihat ms 688D–G); *Barton v Fincham* [1921] 2 KB 291, *Thorne v Smith* [1947] 1 KB 307 dan *Middleton v Baldock* [1950] 1 KB 657 diikut.

(4) Bonus merupakan suatu pemberian ataupun hadiah sebagai tanda bermurah hati, dan ianya tidak boleh dikuatkuasakan, ataupun ianya mungkin sesuatu yang berhak diterima oleh pekerja bila berlakunya suatu syarat terdahulu dan ianya boleh dikuatkuasakan apabila keperluan syarat tersebut dipenuhi. Tetapi dalam kedua-dua kes ianya adalah sesuatu yang berlebihan daripada atau yang merupakan tambahan kepada apa yang biasanya diterima. Oleh kerana bonus adalah suatu bentuk bayaran percuma yagn bersifat budi bicara, penentang tidak berhak mendapatnya sebagai hak. Dalam kes ini penentang adalah tidak berhak menerima bonus dua setengah bulan yang dituntut dalam permohonan (ii) (lihat ms 690D–691E); *Malayan Agricultural Producers Association v All Malayan Estates Staff Union* [1982] ILR 127 dan *Director-General of Inland Revenue v Highlands Malaya Plantations Ltd* [1988] 2 MLJ 99 diikut.]

Notes

For cases on estoppel by conduct, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1542–1547.

Cases referred to

Bartlam v Evans [1936] 1 KB 202
Barton v Fincham [1921] 2 KB 291
Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd [1995] 3 MLJ 331

Chartered Bank v Yong Chan [1974] 1 MLJ 157
Director-General of Inland Revenue v Highlands Malaya Plantations Ltd [1988] 2 MLJ 99
Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd [1968] 2 QB 839
Esso Petroleum Co Ltd v Southport Corp [1950] AC 218
Evenden v Guildford City Association Football Club [1975] QB 917
Farrell v Secretary of State for Defence [1980] 1 All ER 166
Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors [1981] 1 MLJ 238
Janagi v Ong Boon Kiat [1971] 2 MLJ 196
Kerry v Carter [1969] 1 WLR 1372
Lee Kim Seng v Acme Canning Sdn Bhd [1977] 2 MLJ 141
Malaysian Agricultural Producers Association v All Malayan Estates Staff Union [1982] ILR 127
Maharaj v Chand [1986] AC 898
Middleton v Baldock [1950] 1 KB 657
Petroleum Nasional Bhd v Mohd Radzman bin Ramli [1993] 1 ILR 100
Robertson v Minister of Pensions [1949] 1 KB 227
Secretary of State for Employment v Globe Elastic Thread Co Ltd [1980] AC 506
Thorne v Smith [1947] 1 KB 307
Walton Stores (Intestate) Ltd v Maher (1988) 62 ALJR 110

Legislation referred to

Industrial Relations Act 1967 s 20

T Thavalingam (*Shearn Delamore & Co*) for the appellant.
Baidah bte Mohd Nor (*Lim, Han & Teoh*) for the respondent.

Abdul Malik Ishak J: The respondent was, at the material time, the branch manager of the appellant's establishment in Johor Bahru. In that capacity, the respondent had on 9 November 1988 sold a motorcar of the popular model known as Toyota Corolla to HH Lee Motor Credit Sdn Bhd ('Lee Motor') at Batu Pahat for RM42,941.48. The sale of that motorcar was concluded by an acceptance of a Malayan Bank Bhd cheque no 340141 for the said sum which bore the date 9 November 1988. That cheque was meant to be the full payment for the said car. Unfortunately, subsequent events showed that the said cheque was dishonoured and Lee Motor was no where to be found.

That was a costly affair for the respondent for he soon found himself charged for gross misconduct as reflected in the letter dated 22 November 1988. In essence, the charges levied against the respondent were as follows:

(1) for non-compliance of the appellant company's policies pertaining to the administration of the Johor Bahru branch office; and

(2) for causing financial loss amounting to RM42,941.48 to the appellant company by allowing credit facilities to Lee Motor.

A It must be emphasized at the outset, that a domestic inquiry was convened at the Johor Bahru branch office to look into the aforesaid charges on 23 November 1988. That domestic inquiry was chaired by Mr TR Ponniah, the human resources manager together with Mr Micheal Lim, the regional manager of the south division who incidentally was the B respondent's superior officer. Mr Micheal Lim attended that domestic inquiry as a mere observer. Mr Zulkifli Stork, currently the senior branch manager of the appellant company and, at the material time, the sales executive, also attended the domestic inquiry. Ms Yen too, a stenographer with the appellant company, attended the domestic inquiry. The respondent was present throughout the domestic inquiry which was held at his office C from 11am to approximately 2.30pm on 23 November 1988. There was a surprising twist to that domestic inquiry. It is this.

At the conclusion of the domestic inquiry, the respondent tendered a letter dated 23 November 1988 wherein he admitted to the charges levied against him by the appellant company and, at the same time, he D appealed to the management to consider his long service of 23 years with the appellant company and implored that he be given 'a chance to continue working with the company'.

The appellant ignored the respondent's plea and adopted a stern attitude. In view of the respondent's written admission and in the light of the gravity of the misconduct committed by him, the appellant could no E longer repose any trust and confidence in the respondent, and in the circumstances, terminated his services vide a letter of termination dated 26 November 1988.

Section 20(1) of the Industrial Relations Act 1967 ('the Act') provides the cheapest and the speediest remedy to the respondent to obtain F reinstatement (see *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors* [1981] 1 MLJ 238, FC). The respondent however in resorting to s 20(1) of the Act must comply with the strict time schedule as set out in s 20(1A) of the Act. The respondent must present his claim 'not later than 60 days from the expiry' of the letter of termination. Thus, G since the letter of termination was dated 26 November 1988, the respondent had until 25 January 1989 to present his claim for reinstatement to the director general and only then would the director general proceed under s 20(2) of the Act. The respondent knew that he could not resort to the Act and he then proceeded to commence civil proceedings before the magistrate's court which ultimately was heard by the sessions court H judge for the following prayers:

(1) Loss of earnings for three (3) months totalling RM12,480 (calculated at RM4,160 x three months).

(2) Loss of bonus for two and the half months ($2^1/_2$) for 1988 totalling RM10,400 (calculated at RM4,160 x two and the half months).

I (3) Loss of earnings from December 1988 until February 1990 (calculated at RM4,160 per month) and from March 1990 until August 1990 (calculated at RM2,160 per month) totalling RM75,360.

At the conclusion of the trial before the learned sessions court judge, only prayers (a) and (b) were acceded to. An interest of 8% per annum from the date of dismissal till receipt of these sums were ordered in favour of the respondent. Costs too were ordered in favour of the respondent. Prayer (c) was rejected by the learned sessions court judge. Aggrieved by the decision of the learned sessions court judge, the appellant filed their appeal and focussed their attention entirely on prayers (a) and (b).

I will now examine prayers (a) and (b) respectively.

Prayer (a)

There were two contracts of employment between the respondent and the appellant. The first contract dated 31 January 1977 stipulated the period for termination of employment as three months. Whereas the second contract dated 1 January 1984 stipulated the notice for termination to be one month. The respondent, in his evidence, stressed that he never considered the second contract which carried the legend *Salary And Benefits Package* as a contract of employment which replaced the first contract. The respondent seemed to be swayed by the words that appeared in the second contract to the effect that 'it is purely a summary for information of executives and is not intended to represent contracted terms of employment' and held onto the notion that he was not bound by it. The respondent was not asked specifically to sign any part of the second contract and it was argued that a unilateral contract cannot be enforced in a court of law. The respondent was quite blunt when he testified that the appellant themselves failed to comply with the terms of the second contract in so far as EPF contributions were concerned. Instead of 15% EPF contributions which the appellant should have paid as required under the second contract, only 10% was advanced and, consequently, it was argued that the appellant was estopped from relying on the second contract as they themselves failed to comply with the terms dictated therein. It was argued further that this showed that the second contract was never meant to be the terms and conditions of the contract of employment between the parties.

The respondent claimed that he was bound by the first contract but nevertheless agreed that the second contract existed but he asserted that it (referring to the second contract) was 'not a contract but only a summary'. The pertinent question to pose would be, 'What was it a summary of ?' The obvious answer would be that it was a 'summary of the executive remuneration effective 1 January 1984'. The respondent admitted that he read the second contract and claimed that he had understood its contents. But the respondent proceeded to say, 'I did not agree with it'. The next obvious question to ask would be this, 'When did the respondent disagree with the second contract?', 'Was it in 1984 when it was brought to his attention?'. It must be borne in mind that the respondent did not, at any material time, protest either orally or in writing in relation to the second contract. The respondent agreed that the letter dated 21 November 1983 which enclosed the second contract entitled him to an increase in his salary

A scale. Under cross-examination, the respondent adopted a peculiar stand. He agreed that the second contract conferred him new benefits but he went on to say that he only agreed to some of the benefits. For 4 years 10 months 25 days (calculated from 1 January 1984 to 26 November 1988), the respondent remained silent in regard to the second contract. The B respondent blissfully enjoyed the perks and benefits under the second contract until his dismissal on 26 November 1988 — consequently, he should be estopped from denying that the second contract was not applicable. Having enjoyed the fruits of the second contract for that period of time, the respondent had lost the right to repudiate the same. In my judgment, the prolonged delay amounted to an implied affirmation by the C respondent of the second contract.

The doctrine of estoppel has developed with rapid speed that it can now be used in almost any imaginable situation. Thus, the doctrine can even apply to a situation where the relationship giving rise to rights and correlative duties was non-contractual. Examples would be where it was D meant to prevent the enforcement of a liability imposed by statute on a company director for signing a bill of exchange on which the company's name was not correctly given (see *Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd* [1968] 2 QB 839). It is appropriate to say that a statement may also prevent the representor from denying the existence of a statutory liability as reflected in *Robertson v Minister of Pensions* [1949] 1 E KB 227; or to prevent a man from ejecting a woman, with whom he has been cohabitating from the family home (see *Maharaj v Chand* [1986] AC 898). It has been suggested that the doctrine can apply where, before the making of the promise or representation, there is no legal relationship giving rise to rights and duties between the parties (see *Evenden v Guildford City Association Football Club* [1975] QB 917, FC) — where the actual F decision was overruled by *Secretary of State for Employment v Globe Elastic Thread Co Ltd* [1980] AC 506); for comparison reference may he made to an Australian case of *Walton Stores (Intestate) Ltd v Maher* (1988) 62 ALJR 110). Back home in the country, *Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, FC widened the G application of the doctrine of estoppel further when Gopal Sri Ram JCA, speaking for the Federal Court said at p 344:

> The time has come for this court to recognize that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying H fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.
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> Edgar Joseph Jr J (as he then was) in an illuminating judgment in *Templeton v Low Yat Holdings Sdn Bhd* [1989] 2 MLJ 202, 244 applied the doctrine in a broad and liberal fashion to prevent a defendant from relying upon the provisions of the Limitation Act 1953.
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> I The doctrine may be applied to enlarge or to reduce the rights or obligation of a party under contract: *Sarat Chunder Dey v Gopal Chunder Laha* LR 19 IA 203; *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84. It has operated to prevent

a litigant from denying the validity of an otherwise invalid trust (see *Commissioner for Religious Affairs, Terengganu v Tengku Mariam bte Tengku Sri Wa Raja* [1970] 1 MLJ 222) or the validity of an option in a lease declared by statute to be invalid for want of registration (see *Taylor Fashions Ltd v Liverpool Victoria Trustees* [1981] 2 WLR 576). It has been applied to prevent a litigant from asserting that there was no valid and binding contract between him and the his opponent (see *Walton Stores (Interstates) Ltd v Maher* (1988) 164 CLR 387) and to create binding obligations where none previously existed (see *Spiro v Lintern* [1973] 1 WLR 1002). It may operate to bind parties as to the meaning or legal effect of a document or a clause in a contract which they have settled upon (see *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd*) or which one party to the contract has represented or encouraged the other to believe as the true legal effect or meaning (see *The American Surety Co of New York v The Calgary Milling Co Ltd* (1919) 48 DLR 295; *De Tchihatatchef v The Salerni Coupling Ltd* [1932] 1 Ch 330; *Taylor Fashions v Liverpool Victoria Trustees*).

It is apparent from the available evidence that the respondent was blowing hot and cold at the same time. On the one hand the respondent accepted the increase in salary under the second contract but rejected the one month period for notice of termination. That was plain cunningness and slyness on the part of the respondent. It is here that the principle of approbation and reprobation should be vigorously applied. As Greer LJ in his dissenting judgment in the case of *Bartlam v Evans* [1936] 1 KB 202, CA said at p 211:

> It was put by one of my brethern on the ground that a man is not entitled to reprobate that which he has already approbated. In my view, that principle has no application to this case, because it is based on this, that a man may not at one moment take an advantage of some agreement or some fact and at a later moment when it suits him reprobate that which he has approved.

Ali Ag CJ (Malaya) in *Lee Kim Seng v Acme Canning Sdn Bhd* [1977] 2 MLJ 141, FC said at p 141:

> He referred to the unreported case of *Eastern Mining and Metal Company Sdn Bhd v MM Ismail & Ors* [1976] 1 MLJ 166 as decided by the Federal Court following the decision in *Lissenden v CAV Bosch Ltd* [1940] AC 412. The learned Lord President delivering the judgment of the Federal Court said this:
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> > 'In accordance with his contract of service the company was to pay him out of its right pocket, but instead it elected to pay him out of its left pocket. He insists that the company should also pay him out of its right pocket, notwithstanding that the amount already received by him from the left pocket is more than what he would have received from the right pocket. My answer to that is that in the circumstances of this case, he cannot claim to be paid out of both pockets.'
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> Shortly stated, the principle of approbation and reprobation or doctrine of election as applied by the Federal Court was also applied by Arulanandom J to this case which undoubtedly is a much stronger case than that decided by the Federal Court.

In another part of the same judgment and at p 142, his Lordship Ali Ag CJ (Malaya) said at p 142:

> In the instant case it was not open to the appellant to say that he had been deprived of the benefits of the Ordinance having clearly admitted that he had been paid more than what he would get as overtime wages.

In my judgment, the second contract should be accepted as the contract of employment between the parties. One must not forget that the respondent was dismissed for gross misconduct. It was in evidence that the order for the motorcar was signed by the respondent though the very car was delivered by the driver. At the domestic inquiry, the respondent informed Mr TR Ponniah that the cheque from Lee Motor was accepted by the driver. It seemed that the respondent had instructed Mr Zulkifli Stork to remind the driver to accept bank draft as payment but, unfortunately, this instruction was not relayed to the driver. Mr Zulkifli Stork sought to explain that 'the driver has always received bank drafts as payments and therefore I assumed that the driver would know what to collect on the delivery of the car'. The learned sessions court judge was of the view that the respondent was not guilty of any wrongdoing and neither did he breach any of the financial policies of the appellant company. The learned sessions court judge also took into account that it was the respondent who had transacted the sale of the motorcar to Lee Motor but she took into consideration too that at no point of time did the respondent expressly or impliedly instruct that the cheque could be received as payment. But, and this must surely be crucial in determining whether the respondent had breached the appellant company's policies, the learned sessions court judge failed to take into account the following damning evidence:

(1) That the motorcar was delivered to Lee Motor before the cheque was cleared;

(2) That the motorcar was registered on 6 November 1988 before the cheque that was dated 9 November 1988 was cleared;

(3) That when the cheque was dishonoured, the respondent could not stop the registration of the motorcar as he had sent it earlier.

Though the respondent was accorded the discretion to accept cheques from close friends or business associates in an attempt to increase sales, there was nothing to show that the respondent was allowed to deliver motorcars to customers before the cheques had been cleared. Good business sense demands that payment should be effected before delivery takes place especially when one deals in motor trade business. It is my judgment that the learned sessions court judge went off tangent and misapprehended the facts and on this score; I have no hesitation to interfere. As Lord Denning MR said in *Kerry v Carter* [1969] 1 WLR 1372 at p 1376:

> ... We will interfere if the judge has gone wrong in principle or is shown to have misapprehended the facts: but, even if neither of these is shown, we will interfere if we are of opinion that the judge was clearly wrong. After all, the function of this court is to be a court of appeal. We are here to put right that which has gone wrong.

What could the appellant do in the light of the respondent's admission at the domestic inquiry? As was said by the Industrial Court in *Petroleum*

Nasional Bhd v Encik Mohd Radzman bin Ramli [1993] 1 ILR 100 especially at p 102: A

> It is established by authority that where a workman in answer to a charge levelled against him admits his guilt there will be nothing more for the management to inquire into and in such a case the holding of an inquiry would be an empty formality. B

It may well be argued that I am not bound by the decision of the Industrial Court. In addressing this issue, I need only refer to the decision of Lee Hun Hoe CJ (Borneo) (as he then was) in *Director-General of Inland Revenue v Highlands Malaya Plantations Ltd* [1988] 2 MLJ 99 SC, where his Lordship said at p 104: C

> ... It would be wrong to shut out the rulings of the Industrial Court that throw light on a highly pertinent aspect of a payment in respect of employment.

By way of an analogy reference may be made to the English Rent Restriction Acts where the court will make an order for possession without further D inquiry if the tenant admits that a specific statutory ground on which the landlord claims that possession exists and it is reasonable to make an order to that effect. As Atkin LJ said in *Barton v Fincham* [1921] 2 KB 291 at p 299:

> If the parties before the court admit that one of the events has happened E which give the court jurisdiction, and there is no reason to doubt the bona fides of the admission, the court is under no obligation to make further inquiry as to the question of fact ... .

In the same vein Bucknill LJ said in *Thorne v Smith* [1947] 1 KB 307 at p 314–315: F

> ... but if the tenant in effect agrees that the landlord has a good claim to an order under the Acts, I think the judge has jurisdiction to make the order for possession under the Act without further inquiry.

Finally, Evershed MR said in *Middleton v Baldock* [1950] 1 KB 657 at p 661: G

> If the tenant, sued for possession on some statutory ground, chooses to admit in court, or by some equivalent means, the truth of the allegation on which the landlord's claim as based, then, I think it is also established ... that the judge can accept the admission as sufficient to found his jurisdiction, and is not bound himself to investigate the matters of fact alleged. H

Though these English cases revolved on the impact of the English Rent Restriction Act, yet the principles distilled from these cases are apt and can be applied to the present appeal.

The respondent claimed that he was forced into writing and signing the letter of admission. The burden must surely fall on the respondent to I prove that allegation and towards that end, it is by judgment, that the respondent has failed to discharge that burden. Mr TR Ponniah denied under oath that he had forced the respondent into admitting to the charges levelled against the respondent. This piece of evidence was cogently

corroborated by Mr Micheal Lim who was present throughout the domestic inquiry and plainly witnessed the respondent signing the letter of admission.

The respondent was unable to explain as to how the motorcar was registered on 6 November 1988 when the cheque that was meant for the payment of the motorcar was dated 9 November 1988. On scrutiny of the notes of evidence, particularly focussing my attention to the evidence of the respondent I cannot help but feel that his evidence in regard to the sequence of events and the sale of the motorcar to Lee Motor was highly suspect and lacked probative value. The witnesses who testified for the respondent too were not credible. Mr Harold James Fredericks took the stand in a vindictive manner. His testimony was more of a personal attack against Mr Zulkifli Stork and was of no value at all to the respondent. This is understandable. Mr Harold James Fredericks was dismissed by the appellant for misconduct prior to this case. Furthermore, he had no personal knowledge of what had transpired at the domestic inquiry. The testimony of Mr Micheal Tan Ah Lek too was of no assistance to the respondent. He had no knowledge at all of the facts that was in dispute.

The procedure in regard to the sale of new cars is very clear. No vehicle can be delivered or registered until payment is made. When a sale is concluded by means of a cheque, a vehicle can only be registered or delivered to a customer upon clearance of the cheque. From the available evidence, particularly relying on the evidence of Mr Zulkifli Stork, the motorcar was delivered on the instructions of the respondent even before the cheque was cleared. To compound the matter further, the motorcar was delivered to Lee Motor without a single down payment being advanced to the appellant. If these defaults were not breaches of the appellant company's policies, I do not know what is.

The gross misconduct on the respondent's part must surely be borne by the respondent himself. For these reasons, prayer (a) should not be allowed.

Prayer (b)

In his amended statement of claim, the respondent sought for two and a half months' bonus for 1988 totalling RM10,400. Was the respondent entitled to the two and a half months' bonus? The first contract was totally silent on the question of bonus. The second contract had this to say in regard to the issue of bonus:

> It is the practice of the company to pay a bonus annually to executives. There is no contractual right for any executive to receive this payment. The question of whether a bonus ought to be paid in any year as well as the quantum will be determined solely by the company based on the company's profitability and the executive's performance and contribution towards the success of the company.
>
> Executives must be confirmed in their appointments at the time of bonus payment. Executives who leave the service of the company before the completion of a calendar year will not be considered for the payment of a bonus

The respondent testified that he was told that in 1988 that the company gave three (3) months' bonus and the respondent sought out his entitlement limiting it to two and a half months in compliance with his pleadings (*Chartered Bank v Yong Chan* [1974] 1 MLJ 157; *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196; *Farrell v Secretary of State for Defence* [1980] 1 All ER 166 and *Esso Petroeum Co Ltd v Southport Corp* [1950] AC 218). It must not be forgotten that what other employees got must not necessarily mean that the respondent would also get because the respondent left the appellant's company on 26 November 1988 before the completion of that calendar year. What is more surprising is this: Under cross-examination, the respondent admitted that the issue of bonus was discretionary and not a contractual term of his employment. The respondent also admitted that bonus would be disbursed depending on 'business and profitability'. The respondent added that 'when UMW took over, we did not get a bonus because business was very bad'. The respondent unabashedly admitted that 'bonus is at the discretion of the company'. Mr TR Ponniah, Mr Micheal Lim and Mr Zulkifli Stork all confirmed that bonus was discretionary in nature dependent largely on the company's profitability together with the executive's performance and contribution. In my judgment, since bonus was a form of a gratuitous payment of a discretionary nature, the respondent was not entitled to it as of right. The respondent's exit from the appellant's company before the completion of the calendar year for 1988 barred him from claiming two and a half months' bonus. The learned sessions court judge failed to consider this point in her judgment and had she considered this point she might be inclined not to order the payment of the bonus to the respondent. After all, it was said in *Malayan Agricultural Producers Association v All Malayan Estates Staff Union* [1982] ILR 127 especially at p 138:

> Bonus, according to Oxford dictionary, is 'gratuity to employees beyond their wages'. It is an incentive given to an employee. And so long as bonus is a gratuitous payment and its quantum relates to profits and productivity, it will not be right in a concept for us to depart from past industrial court rulings and to make bonus payment a contractual one. We will therefore make an order that bonus shall be paid at the discretion of the employers.

In *Director-General of Inland Revenue v Highlands Malaya Plantations Ltd* [1988] 2 MLJ 99, Lee Hun Hoe CJ (Borneo) (as he then was) said at p 104:

> It is difficult to lay down any general rule as to what bonus is. 1 *Jowitt's Dictionary on English Law* (2nd Ed) at p 238 defines 'bonus' to mean premium or advantage; an occasional extra dividend; a gratuity. The Income Tax Act 1967 does not define the word 'bonus'. Both the learned judges and special commissioners accepted 'bonus' to mean 'a boon or gift over and above what is normally due as remuneration to the receiver'. They were merely following what Stirling J did in *Re Eddystone Marine Insurance* (1894) WN 30 when he said:
>
> > 'I adopt the definition of "bonus" given in the *New English Dictionary viz* a boon or gift over and above what is normally due as remuneration to the receiver, and which is therefore something wholly to the good.'

Lee Hun Hoe CJ (Borneo) (as he then was) continued at p 105 of the same judgment by citing a Canadian case. This was what his Lordship said:

> As O'Connor J said in the Canadian case of *Great Western Co Ltd v Minister of National Revenue* (1947) Ex CR 458 at p 467:
>
> > 'A bonus may be a mere gift or gratuity as a gesture of goodwill, and not enforceable, or it may be something which an employee is entitled to on the happening of a condition precedent and is enforceable when the condition is fulfilled. But in both cases it is something in addition to or in excess of that which is ordinarily received.'
>
> It is the same in the instant case whether the payment is made to the managerial or the non-managerial staff as it is something in addition to or in excess of that which is ordinarily received. The payment may be gratuitous as in the case of the non-managerial staff or it may be payment which the managerial staff are entitled as incentive but nevertheless it is still a 'bonus'. The payment to the managerial staff was only paid on the happening of a condition precedent and which was enforceable once the condition was fulfilled. To adopt what the Earl of Birkenhead said in *Sutton v Attorney-General* (1923) 39 TLR 294, 'bonus' in such a case as the present case is in truth nothing else but an euphemism for 'addition to wages'.

These authorities defined the meaning of the word 'bonus' by resorting to its dictionary meaning. Without a doubt, these authorities are germane and they would be applicable in the context of the present appeal. I do not propose to add anything useful to the definition of the word 'bonus'. In the context of the present appeal, two and a half months' bonus should not be ordered in favour of the respondent.

For the reasons adumbrated above, I allowed the appeal with costs.

Appeal allowed.

Reported by T Vimalavathy